

Hearing Date: October 19, 2016 at 10:00 am

Subject of Proposed Regulation: End of Life Option Act

Section Affected: Title 12, California Code of Regulations, section 509

Beginning in 1884 with the opening of one of the nation's first long term care homes for Civil War veterans, California has maintained an historic commitment to caring for veterans and their families. Under the direction of its Secretary, the California Department of Veterans Affairs (CalVet) currently operates Veterans Homes (Homes) in Yountville, Barstow, Chula Vista, Lancaster, Ventura, West Los Angeles, Fresno and Redding. The Homes, which provide long term health care services for thousands of elderly and disabled veterans and their spouses, are certified by the United States Department of Veterans Affairs (USDVA) and licensed by the California Department of Public Health and the California Department of Social Services, allowing them to carry out CalVet's goal of providing its Homes' members with the continuum of long-term care needed throughout the aging process.

Once admitted to one of the Homes, each member benefits from a broad range of services throughout his or her life regardless of whether the services are provided at the Domiciliary (independent living), Residential Care for the Elderly (assisted living), Intermediate Care (licensed nursing assistance required), Skilled Nursing (round-the-clock care by licensed nurses and certified nursing assistants), or Memory Care/Dementia Care level of care. In order to achieve the goal of providing the foregoing array of services to the Homes' members as their needs change, CalVet receives significant financial assistance in the form of per diem payments from the USDVA, as it seeks to fulfill those needs through changes in programs, technology, and staffing.

The specific problem being addressed in this regulatory action is the conflict between a recently enacted California statute and existing federal law.

On October 5, 2015, California became the fifth state to allow physicians to prescribe terminally ill patients medication to end their lives. ABX2-15, the “End of Life Option Act,” (the Act) permits terminally ill adult patients who have the capacity to make medical decisions to be prescribed an aid-in-dying drug, if specified conditions are met. The Act went into effect on June 9, 2016, ninety (90) days after the adjournment of the special legislative session in which it was passed. (Health & Safety Code §§ 443-443.22.)

Conflict between the California Act and Federal Law

After passage (but prior to implementation) of the Act, CalVet learned of the existence of a conflict between the Act and existing federal law that significantly affects the operation of the Homes, which would prevent CalVet from permitting: (a) Homes members to consume an aid-in-dying drug while residing in a Home; and (b) Homes employees from participating in the activities under the Act, thereby requiring members intending to consume an aid-in-dying drug to first discharge from the Home.

The Act authorizes a mentally competent adult, who has been determined by his or her attending physician (and confirmed by a consulting physician), to be suffering from a terminal disease (as specified in the Act) to make a request for a drug for the purpose of ending his or her own life. The Act further establishes a procedure for making these requests, and additionally requires specified information to be documented in the individual's medical record, including all oral and written requests for an aid-in-dying drug.

Because the Homes receive federal funding, federal law prohibits them from furnishing items or services (including assistance of any kind) for the purpose of causing (or assisting with causing) the suicide, euthanasia, or mercy killing of any individual. (42 U.S.C. § 14402; 38 C.F.R. § 51.210, subd. (s).)

On June 9, 2016, all eligible California citizens became entitled to request an aid-in-dying drug for the purpose of ending their lives. In response to the Act's implementation, CalVet filed an emergency regulatory action with the Office of Administrative Law (OAL) on June 8, 2016. OAL approved this emergency regulation on June 17, 2016.

The emergency regulation, pursuant to Government Code section 11346.1(e), will be in effect for 180 days, and thereafter, repealed unless CalVet either: (a) permanently adopts it in compliance with the notice and comment requirements of the Administrative Procedure Act (APA); or (2) readopts the regulation on an emergency basis.

The purpose of this regulatory action is to make permanent the emergency regulation, pursuant to Government Code section 11346.1(e). At the conclusion of this regular rulemaking proceeding CalVet will certify that it has complied with the APA notice and comment requirements.

Authority for Regulation: Military and Veterans Code

Military and Veterans Code section 74(a) provides, in part, that the Secretary is the "chief administrative officer" of CalVet.

Military and Veterans Code section 1014 provides that the Homes "shall be under the management and control of [CalVet] and subject to the policies adopted by the California Veterans Board."

Military and Veterans Code section 79.2(a) provides that the Governor shall appoint a Deputy Secretary of Veterans Homes “who shall be responsible for the administration of all sites of the California veterans home[s].”

Military and Veterans Code section 79.2(c) specifies that “the role of the deputy secretary [of veterans homes] shall be to oversee and monitor **all** aspects of medical care that is being provided to men and women veterans who are residents in any California veterans home.” (Emphasis added.)

These sections make clear that CalVet has authority to adopt a regulation specifying how the requirements of the Act are to be reconciled with applicable federal law, which strictly prohibits any involvement by state officials in assisting in any activities under the Act. (See Cal. Code Regs., tit. 1, § 14, subd. (a)(2).)

Reconciling these conflicting legal requirements on a statewide basis is clearly an “administrative” function within the purview of the Secretary’s duties as “chief administrative officer” of CalVet. Furthermore, the Deputy Secretary of Veterans Homes is charged with the duty of “oversee[ing] and monitor[ing] all aspects of medical care . . . provided . . . in any California veterans home.” Clearly, whether or not to provide aid-in-dying drugs to Homes’ members falls within the broad category of “all aspects of medical care.”

Read together, these statutory provisions authorize CalVet to adopt statewide regulations reconciling state and federal requirements concerning one aspect of medical care – namely, the implementation of the Act.

Rationale for the Provisions of this Regulation

Section 509(a)

This subdivision states that all terminally ill members are entitled to customary medical care, including counseling, hospice and palliative care. This subdivision is needed in order to make clear that the Homes will provide all necessary end of life care to members, except for aid-in-dying drugs.

Section 509(b)

This subdivision specifies that the Homes will not provide aid-in-dying drugs, as defined in California Health and Safety Code section 443.1, subdivision (b). This subdivision is needed to make clear that the Homes will not jeopardize their continued eligibility for USDVA per diem funding by providing aid-in-dying drugs to members.

This subdivision also prohibits any CalVet employee, contractor, or other person or entity from providing aid-in-dying drugs to any member. This subdivision is needed, in part, to make clear that employees, independent contractors, and other specified persons will not be allowed to provide aid-in-dying drugs to members or to participate in any activities under the Act.

This subdivision also clarifies that the prohibition on employee participation is confined to acts on the premises of the Homes, or actions taken in the course and scope of employment by, or

contract with the Homes. This subdivision is needed to ensure that employees, independent contractors, and other specified persons do not engage in acts while on the premises of the Homes, or while acting within the course and scope of employment by, or contract with, the Homes that would jeopardize the Homes' continued eligibility to receive USDVA per diem funding.

Section 509(c)

This subdivision states that any member desiring to take an aid-in-dying drug must first discharge from the Home. This subdivision is needed to make clear what procedure must be followed if a member wishes to exercise the end of life option.

Section 509(d)

This subdivision provides that if a member discharges from a Home in order to take an aid-in-dying drug, but has a change of heart and decides to not take the drug, then the Home is mandated to re-admit the member and again provide appropriate and necessary medical care.

Evaluation of Consistency/Compatibility with Existing Regulations

CalVet has researched existing regulations and determined that the proposed regulation is consistent and compatible with them.

Local Mandate Determination

The proposed regulation would not impose a mandate on local agencies or school districts.

Fiscal Impact Estimate

The proposed regulation would preserve approximately \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding. This funding is returned to the General Fund and used to pay the equivalent of more than 1,200 staff members working in the Homes.

If a member discharges pursuant to this proposed regulation before he or she consumes an aid-in-dying drug under the Act, CalVet would be barred from collecting the member's unreimbursed cost of care (URCC) obligation under Military and Veterans Code sections 1035 and 1035.05. CalVet recovers the URCC obligation from a deceased member's money and personal property within the meaning of California Code of Regulations, title 12, section 508. This amount varies significantly from case to case. In some cases, a deceased member dies with no recoverable assets or with no URCC obligation. In other cases, CalVet has recovered as much as \$240,000 from a deceased member. The anticipated cost is therefore difficult to assess.

The proposed regulation would not result in a cost to any local agency or school district that is required to be reimbursed.

The proposed regulation would not result in any other nondiscretionary cost or savings imposed on local agencies.

Studies, Reports That CalVet Relied on in Proposing the Regulation

CalVet did not utilize any studies or published reports in developing the proposed regulation.

Economic Impact Assessment

Creation or Elimination of Jobs within the State

Section 509 would prohibit Veterans Home employees from participating in any activities under the Act, including providing aid-in-dying drugs to members, while on the premises of the Veterans Home, or while acting within the course and scope of their employment with the Veterans Home. CalVet concluded that section 509 would not create any jobs within the State, since CalVet is not aware of any jobs whose purpose is to prohibit Veterans Home employees from participating in activities under the Act. Additionally, CalVet concluded that section 509 would not eliminate any jobs within the State, since CalVet is not aware of any jobs whose purpose is to allow Veterans Home employees to participate in activities under the Act.

Section 509 would prohibit Veterans Home contractors from participating in any activities under the Act, including providing aid-in-dying drugs to members, while on the premises of the Veterans Home, or while acting within the course and scope of a contract with a Veterans Home. CalVet concluded that section 509 would not create any jobs within the State, since CalVet is not aware of any jobs whose purpose is to prohibit Veterans Home contractors from participating in activities under the Act. Additionally, CalVet concluded that section 509 would not eliminate any jobs within the State, since CalVet is not aware of any jobs whose purpose is to allow Veterans Home contractors to participate in activities under the Act.

Section 509 would also require a member intending to take an aid-in-dying drug to end his or her life to discharge from the Veterans Home, prior to receiving and taking the drug. CalVet concluded that section 509 would not create any jobs within the State, since CalVet is not aware of any jobs whose purpose is to assist members in discharging from the Veterans Home prior to receiving and taking an aid-in-dying drug. Additionally, CalVet concluded that section 509 would not eliminate any jobs within the State, since CalVet believes that the number of members discharging under section 509 would be so minimal that it would not create any need to eliminate Veterans Home jobs.

Creation of New Businesses or the Elimination of Existing Businesses within the State

Section 509 would prohibit Veterans Home employees from participating in any activities under the Act, including providing aid-in-dying drugs to members, while on the premises of the Veterans Home, or while acting within the course and scope of their employment with the Veterans Home. CalVet concluded that section 509 would not create any businesses within the State, since CalVet is not aware of any businesses engaged in prohibiting Veterans Home employees from participating in activities under the Act. Additionally, CalVet concluded that section 509 would not eliminate any existing businesses within the State, since CalVet is not aware of any businesses engaged in allowing Veterans Home employees to participate in activities under the Act.

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Expansion of Businesses Currently Doing Business within the State

Section 509 would prohibit Veterans Home employees from participating in any activities under the Act, including providing aid-in-dying drugs to members, while on the premises of the Veterans Home, or while acting within the course and scope of their employment with the Veterans Home. CalVet concluded that section 509 would not result in the expansion of businesses currently doing business within the State, since CalVet is not aware of any businesses engaged in prohibiting Veterans Home employees from participating in activities under the Act.

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Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

Section 509 will benefit the health and welfare of Veterans Home members, who are California residents, by avoiding the loss of federal funding which would jeopardize their continued operation. Veterans Home members rely on the Veterans Homes for room and board, medical care, and nursing services.

Section 509 would not result in any benefit to worker safety, notwithstanding the fact that aid-in-dying drugs are, by their definition, fatal, if ingested, since the Veterans Home employees are capable of safely providing aid-in-dying drugs to members.

Section 509 would not result in any benefit to the State's environment, since the provision of aid-in-dying drugs to Veterans Home members has no environmental impact.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would either be more effective in carrying out the purpose for which the action is proposed, or as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

Alternative 1: Prohibit a member from consuming an aid-in-dying drug while on the grounds of the Home, and prohibit Home staff from participating in activities under the Act. If a member requests an aid-in-dying drug, the member would be entitled to transfer to a third-party facility that is willing to prescribe the drug to the member and allow the member to consume the drug at the third-party facility. The member would not discharge from the Home, and the Home would be ultimately responsible for any unreimbursed costs of care associated with the transfer to the third-party facility.

Analysis: While this alternative may be more advantageous to a member desiring to take an aid-in-dying drug, CalVet believes, based upon guidance it received from the USDVA, that this alternative would similarly jeopardize the Homes' continued eligibility to receive \$67,721,000.00 annually (or \$185,000.00 per day) in USDVA funding.